

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PHILLIP J. BARKER,
individually and doing
business as SABRE ASIA,

NO. CIV. S-01-0740 WBS/DAD

Plaintiff,

v.

MEMORANDUM AND ORDER

RIO LINDA CHEMICAL COMPANY,
INC., a Delaware corporation;
VULCAN CHEMICAL TECHNOLOGIES,
INC., a corporation; VULCAN
MATERIALS COMPANY, INC., a
corporation; DOES 1-500,
inclusive,

Defendants.

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Plaintiff seeks to confirm an arbitration award against
defendants Rio Linda Chemical Company, Inc., Vulcan Chemical
Technologies, Inc., Vulcan Materials Company, Inc. and Does 1-
500, inclusive ("Vulcan"). Defendants removed the action to
federal court pursuant to 28 U.S.C. § 1441, asserting
jurisdiction on the basis of diversity. See 28 U.S.C. § 1332.
Plaintiff moves to remand.

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1 I. Procedural Background

2 On April 14, 1999, plaintiff, who is a California
3 citizen, filed suit against defendants for breach of contract in
4 the California Superior Court, County of Sacramento. On December
5 5, 1999, the Superior Court granted defendants' motion to compel
6 arbitration pursuant to the California Arbitration Act ("CAA"),
7 and stayed the action. On March 21, 2001, the arbitrator decided
8 in favor of plaintiff, awarding \$21,128,000, plus attorney's fees
9 and costs.

10 On March 23, 2001, defendants filed a petition to
11 vacate the arbitration award in the United States District Court,
12 Western District of Virginia, Big Stone Gap Division ("Virginia
13 action"), pursuant to the Federal Arbitration Act ("FAA"). On
14 April 5, 2001, plaintiff filed a petition to confirm the
15 arbitration award in Sacramento Superior Court.¹ Plaintiff also
16 filed a motion in the Western District of Virginia to dismiss,
17 stay or abstain the Virginia action.

18 Defendants removed plaintiff's petition to confirm the
19 arbitration award to this court on April 16, 2001, claiming that
20 the petition is a separate and independent proceeding from the
21 action for breach of contract, and that the parties were diverse
22 when plaintiff filed his petition. In addition, defendants move
23 to stay or transfer the action because defendants filed the
24 Virginia action before plaintiff filed his petition to confirm.

25 ¹ Plaintiff was prohibited from filing his petition for
26 at least ten days after the final award. See Cal. Civ. Proc.
27 Code § 1288.4 ("No petition may be served and filed under this
28 chapter until at least 10 days after service of the signed copy
of the award upon the petitioner); see also Cal. Civ. Proc. Code
§ 1013.

1 II. Discussion

2 On plaintiff's motion for remand, defendants bear the
3 burden of establishing that removal jurisdiction is proper. See
4 Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). "Subject
5 matter jurisdiction is determined on the basis of the facts that
6 existed at the time the action was filed." Stock West Corp. v.
7 Taylor, 964 F. 2d 912, 917 (9th Cir. 1992). When removal is
8 based on diversity, complete diversity must exist both at the
9 time the action was filed and at the time of removal. See United
10 Food Local 919 v. Centermark Properties, 30 F.3d 298, 301 (2nd
11 Cir. 1994) (citing 14A Wright & Miller § 3723, at 311-12); Goff v.
12 Michelin Tire Corp., 837 F. Supp. 1143, 1144 (M.D. Ala.
13 1993) (citing Stevens v. Nichols, 130 U.S. 230 (1889)). Further,
14 section 1441 requires that the entire action be removable when
15 subject matter jurisdiction is based on 28 U.S.C. § 1332. See 28
16 U.S.C. § 1441(a) (allowing removal of any "civil action"); 28
17 U.S.C. § 1441(c) (omitting any reference to claims based on 28
18 U.S.C. § 1332); see also Nolan v. Boeing Co., 919 F.2d 1058, 1065
19 (5th Cir. 1990) (use of term "action" in removal statute refers
20 to case in its entirety), cert. denied, 499 U.S. 962 (1991).

21 Diversity did not exist at the time plaintiff filed his
22 complaint for breach of contract because defendants' principal
23 place of business was in California. Although defendants argue
24 that the action was "improperly filed," they did not seek simply
25 dismissal of the action, but instead moved to dismiss or stay the
26 action and to compel arbitration. The Superior Court granted
27 defendants' motion to compel and stayed the action. Then,
28 sometime before plaintiff filed his petition to confirm the

1 arbitration award, defendants moved their principal place of
2 business to Birmingham, Alabama.

3 The cases cited by defendants do not support a finding
4 that plaintiff's petition to confirm the arbitration award can be
5 removed as a separate and independent proceeding from the non-
6 removable breach of contract action. In Cortez Byrd Chips, Inc.
7 v. Bill Harbert Constr. Co., 529 U.S. 193 (2000), the United
8 States Supreme Court considered whether the Federal Arbitration
9 Act ("FAA"), 9 U.S.C. §§ 9-11, limits venue for a motion to
10 confirm, vacate, or modify an arbitration award to the district
11 in which the award was made. See Cortez, 529 U.S. at 195
12 (holding that the FAA does not limit choice of venue; a party may
13 file such a motion in any venue proper under the general venue
14 statute, 28 U.S.C. § 1391). The discussion of venue has no
15 bearing on whether jurisdiction is proper, or whether a petition
16 to confirm an arbitration award is an independent proceeding that
17 is separately removable from a pending action in state court.

18 In Ballantine Books, Inc. v. Capital Distrib. Co., 302
19 F.2d 17 (2nd Cir. 1962), also cited by defendants, the Second
20 Circuit considered whether a federal court could "entertain an
21 independent action dealing with the same subject matter as an
22 action already pending before a state court." Id. at 19. The
23 Second Circuit determined that the district court had
24 jurisdiction to consider a plaintiff's petition to confirm an
25 arbitration award despite the fact that defendant had previously
26 filed a motion in state court to disqualify an arbitrator. Id.
27 at 19-10. The court reasoned that "[a] party's unsuccessful
28 attempt to have a state court entertain a motion to intervene in

1 arbitration proceedings does not give the state court
2 jurisdiction of the entire proceeding." Id. at 20.

3 Ballantine is distinguishable from the present case
4 because it did not involve the removal of a state court
5 proceeding to federal court. The plaintiff in Ballantine
6 commenced its action to confirm the arbitration award in federal
7 court. Further, the prior state court involvement was limited to
8 the consideration and denial of the defendant's motion to
9 disqualify an arbitrator. A non-removable civil action was not
10 pending in state court, and the arbitration proceeding was not
11 compelled by an order of the state court.²

12 Finally, in Manze v. State Farm Ins. Co., 817 F.2d 1062
13 (3rd Cir. 1987), the Third Circuit considered whether the
14 defendant's removal of the plaintiff's petition to appoint a
15 neutral arbitrator was timely under 28 U.S.C. § 1446(b). In that
16 case, plaintiff had previously filed petitions to compel
17 arbitration and appoint a neutral arbitrator in state court,
18 which the court dismissed as moot when the parties settled on
19 the appointment of a neutral arbitrator. When the parties failed
20 to arbitrate, plaintiff again filed a petition to appoint a
21 neutral arbitrator, which the defendant removed to federal court.

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24 ² But see Local 501, International Ladies' Garment
25 Workers' Union v. Barmon Brothers Company, Inc., 418 F. Supp. 267
26 (S.D.N.Y. 1976) (holding that state court's entry of order
27 compelling arbitration did not deprive federal district court of
28 jurisdiction). Garment Workers is distinguishable because like
Ballantine, the case did not involve removal because the petition
to confirm was commenced in federal court. Further, Garment
Workers did not involve an underlying civil action, or the
establishment of diversity jurisdiction.

1 The plaintiff in Manze argued that the defendant's
2 removal was not timely because it was not filed within thirty
3 days from her initial petitions to compel arbitration and appoint
4 a neutral arbitrator. See 28 U.S.C. § 1446(b) (requiring that
5 notice of removal be filed within thirty days from receipt of the
6 "initial pleading"). The Third Circuit concluded that the
7 initial petitions did not constitute the "initial pleading" under
8 section 1446(b) because the state court dismissed the first
9 petitions as moot. According to the court, the plaintiff's
10 second petition to appoint a neutral arbitrator restarted the
11 running period of thirty days under section 1446(b).

12 Unlike in Manze, the state court action here was not
13 dismissed when the court compelled arbitration, but rather, the
14 court stayed the action upon defendants' motion. Thus,
15 plaintiff's petition to confirm would not constitute an "initial
16 pleading" for purposes of removal under the analysis in Manze.

17 In the absence of any authority that directly supports
18 removal of the petition to confirm as a separate proceeding, the
19 court will resolve any doubts in favor of remand. See Gaus, 980
20 F.2d at 566 (emphasizing the "strong presumption" against removal
21 jurisdiction). Because diversity did not exist on the date
22 plaintiff filed his complaint, the court does not have removal
23 jurisdiction based on 28 U.S.C. § 1332.³

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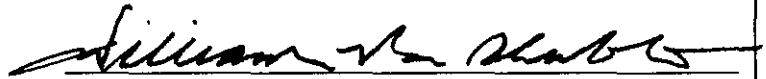
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27 ³ Accordingly, the court does not consider defendants'
28 motion to stay, transfer or dismiss the action.

1 IT IS THEREFORE ORDERED that plaintiff's motion for
2 remand be, and the same hereby is, GRANTED.

3 DATED: May 9, 2001

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5 WILLIAM B. SHUBB
6 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Eastern District of California
May 10, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00740

Barker

v.

Rio Linda Chemical

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 10, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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